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Supreme Court, U.S.
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93-1092

No._____

In The
SUPREME COURT OF THE UNITED STATES
October term, 1993

E.Don Smith pro se, Eileen Smith pro se
Petitioners

v.

Zoning Board of Appeals of the
Town of Greenwich
of the State of Connecticut et al.
Respondents

APPENDIX
Petition for a Writ of
Certiorari to the
United States Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on August 10, 1993. (14632) (14633)

E. Don Smith & Eileen Smith
pro ses, Petitioners
35 Strickland Rd. Cos Cob,
Connecticut, 06807
(203) 661-2883

January 5, 1994

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SUPREME COURT
of the
STATE OF CONNECTICUT

S.C. 14632
E.DON SMITH AND EILEEN SMITH
v.
ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH, THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, INC. AND ANITA de LESSEPS KEEFE

AMICUS CURIAE BRIEF OF PLANNING AND ZONING LAW SECTION OF THE CONNECTICUT BAR ASSOCIATION

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ARGUMENT

The Planning and Zoning Law Section of the Connecticut Bar Association, as amicus curiae, asks this Court to affirm the decision reached by the Connecticut Appellate Court in E. Don Smith, et al, vs. Zoning Board of Appeals of the Town of Greenwich, 29 Conn. App. 28 (1992). Except as provided herein, the amicus curiae rely on the statement of facts and nature of the proceedings as set out in that decision. The interest of amicus derives from the position as an impartial Court-invited commentator on a land use issue of interest to the PLanning and Zoning Law Section.

I. A PLANNING AND ZONING COMMISSION MAY NOT DENY A SUBDIVISION APPLICATION ON THE BASIS THAT THE PROPERTY IS LOCATED IN AN HISTORIC DISTRICT AND THAT THE DEVELOPMENT OF THE PROPERTY MAY BE INCONSISTENT WITH THE HISTORIC PRESERVATION OF THE DISTRICT.

The Defendant-appellant Planning & Zoning Board of Appeals of the Town of Greenwich ("Defendant") argues that the Town's Charter and certain other enumerated General Statutes permit it to consider historic factors in deciding a subdivision application, and that Defendant's subdivision regulations are sufficiently adequate and precise to allow an applicant to know on what basis historical factors are to be applied to the subdivision analysis. Defendant also argues that it is authorized to look to the Town's Plan of Development to quide it in this matter. We think not for the reasons discussed below.

A. The Powers Of An Administrative Land Use Agency Are Strictly Proscribed By the Parameters Of Its Enabling Legislation Be It By Special Act Or Pursuant To Connecticut General Statutes.

Public officials can only act within the scope of the powers and duties which the law prescribes for them. Ghent v. Zoning Commission of the City of Waterbury, 220 Conn. 584, 600 A.2d 1010, 1012 (1991). Municipalities have no inherent legislative powers and can only exercise those powers expressly granted to them by the Legislature, or powers which are necessary to carry out an expressly delegated power or duty. Simons vs. Canty, 195 Conn. 524, 529, 488 A.2d 1267, 1270 (1985). All towns exercising control over the subdivision of land in Connecticut do so under either the statutory delegation of the general enabling statute, Conn. Gen. Stat. §8-25, or pursuant to a municipal charter adopted as a special act of the legislature. In either case, the power of the local planning authority to adopt subdivision regulations is limited by the terms of the statute or special act. Caldrello vs. Planning Board of New London, 193 Conn. 387, 391, 476 A.2d 1063 (1984). Bishop vs. Board of Zoning Appeals, 133 Conn. 614, 619, 53 A.2d 659 (1947).

Defendant initially received its authority to approve or disapprove subdivisions from Special Act 469 ("Act") (Appendix A-1). The Act was subsumed within the Charter for the Town pursuant to "AN ACT PROVIDING A HOME RULE CHARTER FOR THE TOWN OF GREENWICH"

(Appendix A-7). It is to the Charter that we must look to determine the power of the Town of Greenwich's Planning and Zoning Commission ("Commission") to establish particular substantive areas of subdivision regulation and therfore, the extent of Defendant's power to decide subdivision applications. 1

In Section 98, the Charter delineates the extent to which the Commission can regulate subdivisions incorporating many of the provisions of Conn. Gen. Stat. §8-25 which controls the subdivision of land and serves as the enabling subdivision legislation for the non-special act Connecticut communities (Appendix A-10). The Charter is the source of the authority of the Commission governing the allowable content of its regulations and subdivision process, except where there is a clear legislative intent that the general statute controls. Pissola vs. Planning and Zoning Commission Town of Plainville, 167 Conn. 202, 206, 355 A.2d 21,24 (1974).

In determining whether the Defendant is authorized to deny subdivisions for historical reasons, analysis of the Charter must determine that the Commission has the right to adopt regulations enabling it to do so.

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1 Defendant acted as a planning commission in deciding Plaintiff's subdivision application after a de novo review pursuant to the special procedural authorization of Section 103 of its Charter, which provides that it will be bound to the same extent as the Commission by any subdivision regulations authorized by the Charter.

In this analysis, the same principles of

construction apply which govern construction of any statutue or municipal ordinance. Arminio vs. Butler, 183 Conn. 211, 217, 440 A.2d 757 (1981). Where words and phrases are clear and unambiguous, the courts will not read into enabling legislation by construction, provisions which are not clearly stated. Harlow vs. Planning & Zoning Commission of Westport, 194 Conn. 187, 193, 479 A.2d 808, 812 (1984); Dowling vs. Zoning Bd of Appeals of Old Lyme, 187 Conn. 689, 694, 447 A.2d 1172, 1174 (1982). The expressed enumeration of powers granted to municipalities excludes all other powers not expressly delegated to them other than those which follow by necessary implication. City Council of West Haven v. Hall, 180 Conn. 243, 250, 429 A.2d 481, 485 (1980). When ascertaining whether subdivision regulatory powers have been properly derived from the enabling legislation, it is well-established that the legislation be strictly construed;

> It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization for such regulation must exist...in other words, in order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather we must search for statutory authority for the

enactment. ....Finn, Trustee vs. Planning and Zoning Commission of the Town of Seymour, 156, Conn. 540, 545, 244 A.2d 391, 393 (1968).

Section 101 of the Charter sets forth those areas of concern that Defendant's subdivision regulations are meant to control or regulate (Appendix A-11). There is no language in that section, or any other section of the Charter addressing subdivisions, that mentions the word "historic" either pertaining to historic concerns or historic districts. By contrast, there is specific language authorizing the Commission to regulate and make provisions for such matters as water, drainage, sewerage, flood control, street layout and grading, public utility services and the provision of parks and playgrounds. 2.

Defendant claims its authority for being able to regulate and decide subdivisions for historical considerations arises from the Charter's charge in Section 101(d) that subdivision "regulations provide that the land be of such character that it can be used for building purposes without danger to health or the public safety." (Defendant's Brief, pp. 14,15.) While this phrasing is broader and less defined than the other enunciated areas of regulatory concern, it is not so broad as to let the Commission regulate land use based on historic impacts. It is axiomatic that

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2 Sections 101(d), (e) and (g) of the Charter.

> In order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather, we must search for statutory authorization for the enactment, and the delegation of authority to municipalities is narrowly construed. 3

There is nothing in Section 101(d) to alert the reader to the possibility that the Commission is authorized to consider the impact of a subdivision upon an historic area. "Health" describes the condition of being sound in body, mind or spirit, especially to be free from physical disease and pain. 4 It does not connote historical concerns. "Safety"is the condition of being safe from undergoing or causing hurt, injury or loss. 5 Both of these words relate to whether the subdivision preperty is physically "buildable" and not to whether it will impact more esoteric and subjective sensibilities dealing with

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3 Simons vs. Canty, 195 Conn. at 530, 531, 488 A.2d at 1270, 1271; Avonside, Inc. vs. Zoning and Planning Commission of Town of 540, 545, 244 A.2d 391, 393 (1968).
Avon, 153 Conn. 232, 236, 215 A. 2d 409, 411 (1965); Finn, Trustee vs. PLanning and Zoning Commission of the Town of Seymour, 156 Conn. 540, 244 A.2d 391

4 Webster's Ninth New Collegiate Dictionary, Copyright 1984, pg 558.

5 ., pg. 1036.

aesthetic or historic concerns outside of the subdivision. 6 Nothing in the Charter ever mentions or implies in any way that historical concerns are meant to be considered in determing whether building on a particular piece of land is dangerous. The enabling language necessary for the Commission to create regulations allowing it to decide subdivisions on their historical impact is simply not to be found within the Charter.

Defendant posits further that other statutory authorities express a sufficiently strong historic preservation policy to support its denial of the subdivision for historical reasons (Defendant's Brief, pp. 15-19). Defendant looks to Conn. Gen. Stat. §7-147, §7-148(c)(8) and the Environmental Protection Act §22a-1a et seq but these statutes do not control the subdivision of land though they may be relevant for other administrative processes that may impact plaintiff's property.

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6 This Court has rejected similar enabling language as support for the proposition that a subdivision may be denied for having "unbuildable" lots where those lots do not have safe and adequate access to an offsite town road. That language did not allow the planning commission to look beyond the character of the land "for building purposes". Reed vs. Planning and Zoning Commission, 208 Conn. 431, 435, 544 A.2d 1213 (1988)

B. Assuming, Arguendo, That Defendant Was Authorized By Its Charter To Promulgate Regulations Allowing Denial Of A Subdivision For Its Impact On Historic Preservation Goals, Defendant's Regulations Did Not Contain Known And Fixed Historical Review Standards To Guide It.

Assuming, arguendo, that Defendant was authorized by its Charter to deny a subdivision for its historic impact on the community, Defendant's regulations must, to be enforceable, contain known and fixed standards applying to all cases of like nature, and must conform to the principle that a regulation, like a statute, cannot be too general in its terms. Ghent v. Planning Commission of the City of Waterbury 219 Conn. 511, 594 A.2d 5 (1991). Defendant contends its denial for failure "to preserve the natural features of the landscape; i.e. the historic streetscape," and to protect the integrity, appearance and historic charcter of the historic district, is authorized by the broad "Purposes" language of section 6-260 (Defendant's Brief, pp. 8-9) of the Regulations. 7 The relevant portions of that section state that the subdivision regulations are meant to

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7 References to Regulations are to Article 4, Subdivisions Greenwich Municipal Code (Appendix A-15).

- Further the orderly development of the Town in accordance with the Town Plan of Development. [§6-260(a)(1)]

- Control the layout of lots to protect the environment. [§6-260(a)(4)]

- Secure the preservation of natural features of the landscape and the setting aside of open space for the secreational needs of future residents. [§6-260 (a)(7)]

Nowhere are the words "historic," "historical streetscape," or "historic and architectural resources" even mentioned. 8 It is ludicrous to suggest that these regulations contain criteria reasonably precise and adequate to guide the Commission in deciding whether an application meets the requirements for historic preservation or should be denied.

C. Defendant's Reliance On The Plan of Development As A Source of Authority To Consider Historical Factors Is Misplaced.

Criteria for evaluating a subdivisions's compliance with the requirements of the regulations must be

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8 These terms are used to cite the failings of the subdivision application in the reasons for denial given by Defendant in its decision (Appendix A-20).

sufficiently set forth in the regulations. Historical standards that may be in the Plan of Development ("Plan") have not been aset forth in the regulations. While a requirement that subdivisions comply with the applicable standards of the zoning regulations is both prescribed by the enabling statutes 9 and acceptable because the zoning regulations contain fixed and ascertainable standards for the physical

layout of a subdivision, the same cannot be said for a plan of development. The Plan by its very nature is a general, conceptual planning tool. The Charter acknowledges that the Plan is merely a recommendation for the most desirable use of land. (Appendix A-9).

Even if the Plan were deemed to contain fixed and ascertainable standards for historic and architectural resource preservation, they are not standards that may be incorporated into the regulations for the purpose of

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9 Conn. Gen. Stat. §8-26.

10 Defendant erroneously contends this provision of the Charter is not a bar to using the Plan of Development to deny Plaintiff's subdivision. (Brief pp 21-22). It is illogical to interpret the prohibition as applying only where there is a potential for change from one type of zoning use to another. Subdivisions can only reflect current zoning conditions. The Charter prohibits using the Plan to block a different way of using the property for uses already allowed by zoning.

denying a subdivision application. The Charter in Section 98 specifically prohibits the Plan's provisions from preventing the use of land for a purpose that would otherwise be allowed, i.e. creating three residential lots from the subdivision land. 10 The sole exception permits the Commission to refuse subdivision approval for failure to conform with street and drainage systems within the Plan. (Appendix A-10).

D. The Regulations Use The Words Historic Or Historical In Only Two Provisions And These Provisions Are Not Relevant To This Application.

The regulations cited by Defendant which discuss historic factors, Section 6-266 (a)(19) and 6-266(a) (20), have no relevance to the issue before the court and do not support Defendant's claim. These sections which call for an evaluation of historical and archeological factors apply only when the Commission, or Defendant, request that an environmental assessment be performed, and no such request was made (Defendant's Brief, p. 13). Because an Environmental Assessment was never requested, Section 6-296 (d), the only other regulation to mention the word "historic," also never became relevant. That Section specifically, though it is not conceded validly, permits the Defendant to require a redesign or larger lots only where an Environmental Assessment indicated a need to do so to protect environmental or historic resources. Even then, there are no known standards to reasonably let the Commission and public know of the circumstances under which historic

factors will permit such a redesign. Ghent vs Planning Commission, supra at 518.

Plaintiff's application met all applicable subdivision regulations and should have been approved. "The planning commission, acting in its administrative capacity herein, has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance." Reed vs. Planning and Zoning Commission, supra 433.

II. CONCLUSION

While some leeway as to the content of subdivision regulations is appropriately given to planning commissions, it is well-settled that those commissions are not given any authority to go beyond their enabling legislation. To allow subdivision review based on historic factors where not specifically authorized will open the door to ever-increasing speculative and subjective reviews depriving applicants of the right to know the physical subdivision standards upon which their application will be judged. After all, subdivision regulations exist so as to ensure development consistent with the physical, but authentic features of the land. The Appellate Court correctly noted that the state and the Town of Greenwich have undertaken to regulate for historic concerns pursuant to Conn. Gen. Stat. §7-147 and it is through that specific enabling legislation that historic concerns should be addressed.

For all of the foregoing reasons, amicus curiae urge this Court to affirm the decision of the Appellate Court.

Respectfully submitted,

THE PLAINTIFF

signed Robin Messier Pearson, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 9th day of June, 1993 to

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APPENDIX

ITEM

Excerpts from Special Act 459

Excerpt from Special Act Creating Charter for Town of Greenwich

Excerpts from the Charter, Greenwich Municipal Code

Excerpts from Greenwich Municipat Code Article 4 - Subdivisions

Letter of Denial from Defendant Planning and Zoning Board of Appeals may 15, 1989

E. DON SMITH ET AL. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH
(10431)

DALY, NORCOTT and LAVERY, Js.

The plaintiffs appealed to the trial court from a decision by the defendant zoning board of appeals of the town of Greenwich denying their application for approval to subdivide certain of their real property. The trial court, concluding that the board's consideration of historical factors was appropriate and that the record supported the board's decision, rendered judgment upholding the decision of the board, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the trial court incorrectly upheld the board's denial of the plaintiffs' application; the statutes (§§ 8-25 and 8-26) setting forth substantive and procedural subdivision requirements do not authorize the inclusion of historical factors, the reasons given by the board for the denial were not based on known and fixed standards, the Greenwich town charter specifically provides that the plan of development cannot prevent the use of land that is otherwise lawful, and it is the duty of the historic district commission, not the planning and zoning commission or the zoning board of appeals, to decide whether a building should be erected in an historic district.

Argued May 1—decision released September 8, 1992

Appeal from the decision by the defendant denying the plaintiffs' application for subdivision approval, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Cioffi, J.*,

granted the motion filed by the Historical Society of the Town of Greenwich, Inc., et al., to be made defendants; thereafter, the matter was tried to the court, *Ryan, J.;* judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

E. Don Smith, pro se, and *Eileen Smith,* pro se, the appellants (plaintiffs).

James W. Macauley, for the appellee (named defendant).

William E. Hegarty, for the appellees (defendant the Historical Society of the Town of Greenwich, Inc., et al.).

LAVERY, J. The plaintiffs, E. Don Smith and Eileen Smith, appeal from the trial court's decision affirming the denial of their subdivision application by the zoning board of appeals of the town of Greenwich.

The dispositive issue in this appeal is whether the trial court correctly upheld the denial of the plaintiffs' subdivision application. The trial court found that the application conformed to all the stated subdivision regulations, but that it "did not meet the purposes of the subdivision regulations . . . . It does not conform to the town of Greenwich plan of development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape: namely the historic streetscape." We reverse the judgment of the trial court.

The relevant facts are as follows. The plaintiffs reside at and are owners of property located at 35 Strickland Road in Greenwich. The property is located in an R-7 zone and contains 33,032 square feet. The minimum lot size for this zone is 7500 square feet. The property

is also located in an historic district. In January, 1987, the plaintiffs submitted a subdivision application to the planning and zoning commission of the town of Greenwich (commission), seeking to subdivide the property into three lots. In April, 1987, the commission conducted a hearing on the plaintiffs' application and advised them to proceed to a final subdivision plan, subject to the resolution of a number of specified issues prior to the final application submission.[1]

The plaintiffs subsequently proposed a final subdivision plan. On November 22, 1988, the commission denied the subdivision application by the following resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

[1] In particular, the commission requested the following:

"1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

"2. The commission observed that the area reserved for park and playground being 14.67 percent, conventionally required to be 15 percent, is acceptable as it is calculated from a gross area which includes a free-throw lot for which park and playground is not required.

"3. The utility easement shall be located so as to minimize impacts to significant trees.

"4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

"5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

"6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

"7. That provisions of access easements be indicated on the record sheet.

"8. That the existing southerly curbcut be the sole accessway to Lot 1.

"9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

"10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc., be submitted for review and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic district; and

"WHEREAS a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development'; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property which would provide for the same or greater number

approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distance, if significant trees or the stone wall are adversely effected.

"11. The applicant must obtain a sewer permit prior to the issuance of a building permit.

"12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

"13. The following note is to appear on the construction sheet: 'Prior to any excavation(s) the applicant(s), in accordance with Public Act 77-350, shall be required to contact Call Before You Dig, Inc., at 1-800-922-4455 for markout of underground utilities.'

"14. Submit a driveway plan in accordance with Sec. 6-131 [of the Greenwich Municipal Code]. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC and D.P.W. prior to submitting final plan."

of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFORE, BE IT RESOLVED that final Subdivision #1066 of E. Don Smith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J. A. Kirby Company dated March 17, 1988, revised September 26, 1988, is hereby denied."

The plaintiffs appealed the decision of the commission to the defendant zoning board of appeals of the town of Greenwich (board). The board then conducted a de novo public hearing on the plaintiffs' final subdivision plan pursuant to § 103 of the Greenwich Municipal Code. The proposed subdivision called for three lots, the first containing the plaintiffs' residence, the second containing the plaintiffs' barn, and the third the presently unimproved area in front of the plaintiffs' residence. At the public hearing, the chairman of the historic district commission urged the board of appeals to reject the subdivision, stating that the historic district commission would not allow any structure to be built on the third lot. After a lengthy hearing, the board denied the plaintiffs' appeal on the following grounds: "The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape.

"Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic District Commission which among other things, oversees erection and alteration of buildings in said district. Such

plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

"The applicants were aware of the property's location in the Historic District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

"The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the *Coastal Area Management Act.* The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of *natural features of vistas.*" (Emphasis in original.)

The plaintiffs appealed the board's decision to the Superior Court, pursuant to General Statutes § 8-8 (2) (b). The trial court upheld the board's decision, ruling against the plaintiffs' claims that the proposal met the requirements of the subdivision regulations as written and that the town plan of development is not a regulation. The trial court further found, however, that the board's conclusion, based on the Coastal Area Management Act, was not based on substantial evidence and was not a sufficient reason to deny the subdivision application.

The court found in relevant part as follows. "Section 6-260 of the Greenwich Municipal Code provides that one of the purposes of the subdivision regulations is

to 'further the orderly development of the town in accordance with the town plan of development.' The town plan of development has as one of its 'Basic Objectives' the preservation of historic resources. The town plan of development also provides that 'Greenwich has a rich . . . historical heritage that should be protected for the benefit and enlightenment of future generations,' and that 'conserving the Town's . . . historical resources is a notably effective land use tool for preserving the essential character and spirit of the community.' Other references to the importance of historic factors appear in the town plan of development. An evaluation of historical factors is specifically mentioned in the Greenwich Subdivision Regulations, § 6-266 (a) 19, governing subdivisions in the coastal zone.

"It is the opinion of the court that the plaintiffs' position is without merit. Not only do the subdivision regulations mention historic factors, but they state as a purpose the development of the town in accordance with the town plan of development, which has preservation of historic resources as a basic objective. Further, given the established public policy favoring historic preservation, see General Statutes § 7-147a et seq. and Greenwich Municipal Code § 6-307, and the plaintiffs' deed restriction, it is found that the board did apply standards contained in the regulations to the subdivision, and plaintiffs had notice that historic factors would be considered.

"The board's finding that the proposal would impair the historic streetscape is supported by the record. The Smiths' side of Strickland Road is characterized by homes on lots with sweeping front lawns. The plaintiffs plan to convert their front lawn into a building lot and construct thereon a house with a thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front properly line, twenty feet from the south property line, and fifteen feet from a line of trees. These

exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the board's conclusion in that regard.

"The board also cited the opposition of the historic district commission, which, among other things, oversees erection and alteration of buildings in the historic district."

The trial court ultimately concluded that the board's consideration of and decision based on historic factors was proper and that the evidence on the record was sufficient to support the board's decision that the proposed subdivision would impair the appearance of the historic streetscape. The plaintiffs appealed from the trial court's dismissal of their appeal after we granted certification.

We disagree with the trial court for the following reasons: (1) the enabling statutes on subdivisions did not give the defendant the authority to include historical factors in its regulations; (2) the terms "town plan of development," "historic factors" and "historic streetscape" are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district.

" 'It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization for such regulation must exist. . . . In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition

against such an enactment; rather, we must search for statutory authority for the enactment.' . . . " (Citations omitted.) *Finn* v. *Planning & Zoning Commission*, 156 Conn. 540, 545, 244 A.2d 319 (1968).

Substantive subdivision requirements are set forth in General Statutes § 8-25 and procedural subdivision requirements are set forth in General Statutes § 8-26.[2] The subdivision regulations are required to conform to local zoning regulations. Subdivision regulations cannot impose minimum lot size, shape, width and depth requirements greater than those required under the zoning regulations for the zone where the property is to be subdivided or deny approval of lots that meet all zoning requirements. *Christofaro* v. *Burlington*, 217 Conn. 103, 107, 584 A.2d 1168 (1991). Also, subdivision regulations can have provisions to meet the general test in § 8-25 that the land to be subdivided shall be of such character "that it can be used for building purposes without danger to health or the public safety."[3] Further, the definition of subdivision in the regulations must conform with the definitions of subdivision and resubdivision set forth in General Statutes

[2] General Statutes § 8-25 provides in part: "Such regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety that proper provision shall be made for water, drainage and sewerage and . . . that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the plan of development as described in section 8-23, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs. . . ." Section 8-25 also permits regulation of street grades and the extent of improvement of subdivision roads, open spaces, parks and playgrounds, soil erosion and sediment controls, the provision of public utilities and services, and energy efficient patterns of development and use.

[3] These regulations can include requirements for an application form with required information on it, a proposed subdivision map, a topographic map, a soil suitability report for septic systems on the proposed lots, engineer drawings for proposed roads and/or drainage facilities, and a map showing inland wetland area boundaries.

§ 8-18. *Peninsula Corporation* v. *Planning & Zoning Commission*, 151 Conn. 450, 451, 199 A.2d 1 (1964).

The enabling statutes do not allow a planning or planning and zoning commission to promulgate subdivision regulations based on historic and architectural concerns, historic streetscape or the integrity and historic character of a historic district. The parties stipulated, and our review of the regulations confirms, that the application conformed to all of the regulations of an R-7 zone. At oral argument, the board's counsel conceded that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved because it met all of the regulations not concerned with "historic." The reliance by the board in a subdivision application on matters "historic" is outside the enabling statute and is void.

"When a municipal planning commission considers the approval or disapproval of a subdivision plan, it is acting in an administrative capacity rather than in a legislative capacity. *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 433, 544 A.2d 1213 (1988). 'The planning commission, acting in its administrative capacity herein, has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance.' Id.

" ' "The designation of a particular use of property as a permitted use establishes a *conclusive presumption* that such use does not adversely affect the district and *precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district.*" ' (Emphasis added.) *TLC Development, Inc.* v. *Planning & Zoning Commission*, 215 Conn. 527, 532-33, 577 A.2d 288 (1990)." *Sowin Associates* v. *Planning & Zoning Commission*, 23 Conn. App. 370, 374, 580 A.2d 91 (1990).

"Subdivision regulations cannot be too general in their terms and must contain known and fixed standards that apply to all similar cases. *Sonn* v. *Planning Commission*, 172 Conn. 156, 159–60, 374 A.2d 159 (1976). A commission's regulations must be reasonably precise in subject matter and reasonably adequate and sufficient to give both the commission and those affected by its decision notice of their rights and obligations. *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946); see *Sonn* v. *Planning Commission*, supra, 159.

"General policy statements gleaned from subdivision regulations regarding compliance with public health and safety regulations do not provide a sufficient basis for rejection of a subdivision permit. *TLC Development, Inc.* v. *Planning & Zoning Commission*, supra, 530 n.2. Furthermore, the conclusive presumption set forth in *TLC Development, Inc.*, precludes a commission's reliance on a proposed subdivision's failure to coincide with the general harmony of the district. Id., 533." *Sowin Associates* v. *Planning & Zoning Commission*, supra, 376.

In the present case, the reasons given by the board for the denial of the subdivision application, even if "historic," was part of the enabling act, were not based on fixed and known standards that could apply to all similar subdivisions. At best they were general policy statements.

The board made the following findings that demonstrate this point. First, "[t]he proposed subdivision did not meet the purposes of the subdivision regulations as provided in Sec. 6-260 thereof."[4] This is a general

[4] "[Greenwich Municipal Code Subdivision Regulations] Sec. 6-260. Purposes of Article.

(a) The purposes of this Article shall be to:

policy statement. Section 6-260 of the Greenwich municipal code subdivision regulations sets forth general purpose statements, no standards and does not mention the words "historic" and "historic streetscape." They are not mentioned in this section or any other section of the subdivision regulations.[5]

Second, "[the proposed subdivision] does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objections of preservation of historic and architectural resources." This is a general purpose statement without any fixed and known standards. In addition, § 98 of the Greenwich town charter specifically provides that the commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land contrary to that shown on the plan of development.[6]

(1) Further the orderly development of the Town in accordance with the Town Plan of Development.

(2) Insure that any land subdivided can be used for building purposes without danger to health or public safety. (3/9/81)

(3) Regulate the layout of streets in accordance with sound engineering principle to further the orderly development of the existing and projected street systems of the Town.

(4) Control the layout of lots to protect the environment.

(5) Regulate the layout, design and construction of drains along natural drainage routes and watercourses to further the orderly and efficient development of the drainage system of the Town.

(6) Provide for protective control measures in areas subject to flooding.

(7) Secure the preservation of natural features of the landscape and the setting aside of open space for the recreational needs of future residents.

(8) Control the placement of utilities."

[5] See footnote 8, infra.

[6] "[Greenwich Town Charter] Sec. 98. Plan; limitation on effect.

"(a) The Plan of Development shall not, except as specifically provided in this Article, prevent the use of any land for any purpose otherwise lawful, and shall not in any way reduce the amount of the award which any landowner may be entitled to receive for his land in any condemnation proceedings, whether or not the landowner or his predecessors in title shall have improved or altered his land contrary to the Plan of Development.

"(b) The Commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land

Third, "[the proposed subdivision] does not preserve the natural features of the landscape; namely, the Historic streetscape." There is neither a general nor a specific definition of "historic streetscape" in the regulations, let alone a known or fixed standard.

Finally, the board found that "the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan." There is nothing in the subdivision regulations that has anything to do with the historic district. The land in question is located in an R-7 zone, and the plaintiffs' subdivision application in every way conforms to the zoning and subdivision requirements of the R-7 zone.

Our disagreement with both the board and the trial court is the confusion of the planning and zoning commission's duties and functions as to subdivision regulations and applications with the historic district commission's duties as an administrative board to hear and decide applications for certificates of appropriateness as set forth in General Statutes § 7-147d.[7] As

contrary to that shown upon the Plan of Development, except insofar as the Commission may, under Section 101, require the streets and drains in such subdivision to conform to the street and drainage system shown on the Plan of Development."

[7] "[General Statutes] Sec. 7-147d. CERTIFICATE OF APPROPRIATENESS: PARKING AREAS. (a) No building or structure shall be erected or altered within an historic district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to the historic district commission and approved by said commission.

"(b) No building permit for erection of a building or structure or for alteration of an exterior architectural feature within an historic district and no demolition permit for demolition or removal of a building or structure within an historic district shall be issued by a municipality or any department, agency or official thereof until a certificate of appropriateness has been issued. A certificate of appropriateness shall be required whether or not a building permit is required.

"(c) The historic district commission may request such plans, elevations, specifications, material and other information, including in the case of demolition or removal, a statement of the proposed condition and appearance

Professor Tondro states, "[t]he historic district commission's regulatory tool is the certificate of appropriateness. No building can be erected or altered within the district until the commission has issued a certificate. The municipality may not issue a building or demolition permit for any structure until a certificate has first been granted by the commission. Even outdoor advertising signs and bill posters need a certificate. Nor may any area within the district be used for parking, other than residential, without a certificate from the commission (Section 7-147d)." T. Tondro, Connecticut Land Use Regulation (1983 Sup.) p. 80.

The plaintiffs met all the requirements of the subdivision regulation of the town of Greenwich.[8] Because the property is located in an historic district, the plaintiffs must obtain a certificate of appropriateness from the historic district commission before they may build

of property after such demolition or removal, as may be reasonably deemed necessary by the commission to enable it to make a determination on the application. The style, material, size and location of outdoor advertising signs and bill posters within an historic district shall also be under the control of such commission. The provisions of this section shall not be construed to extend to the color of paint used on the exterior of any building or structure.

"(d) No area within an historic district shall be used for industrial, commercial, business, home industry or occupational parking, whether or not such area is zoned for such use, until after an application for a certificate of appropriateness as to parking has been submitted to the commission and approved by said commission. The provisions of this section shall apply to the enlargement or alteration of any such parking area in existence on October 1, 1973."

[8] We note that the trial court incorrectly relied on § 6-266 (a) (19) of the Greenwich municipal code subdivision regulations. That section addresses environmental concerns in the context of the preliminary layout, and provides in relevant part:

"PRELIMINARY LAYOUT CONTENTS.

(a) . . . The preliminary layout shall include as many of the following items of information as is practicable.

• • •

(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environmen-

in accordance with their subdivision plan. The plaintiffs are entitled to a fair hearing on their application before a neutral and unbiased historic district commission.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the appeal and ordering the granting of the subdivision application.

In this opinion the other judges concurred.

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tal specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following: (3/9/81)

(a) Conformance with Open Space Plan of Development

(b) Significant wetlands

(c) Steep Slopes

(d) Stormwater Drainage

(e) Soils capabilities

(f) Vegetation including forested areas and the identification of trees over 10" in caliper when not in part of forested areas.

(g) Significant geological formations

(h) Historical and archaelogical factors

(i) Animal habitats

(j) Water availability and quality

(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

(l) Other data which the Commission deems appropriate

The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan."

D.N.CV0101333 S

SUPERIOR COURT
STAMFORD / NORWALK
JUDICIAL DISTRICT
AT STAMFORD

E.DON SMITH & EILEEN SMITH
V
ZONING BOARD OF APPEALS OF THE
TOWN OF GREENWICH

APRIL 10, 1991

MEMORANDUM OF DECISION

This is an appeal from a decision of the Greenwich Planning and Zoning Board of Appeals denying an application to subdivide property in an historic district. The Plaintiffs are E.Don Smith and Eileen Smith, the owners of the subject property.

In early 1987 the plaintiffs applied to the Greenwich Planning and Zoning Commission (hereinafter "Commissioner") for approval to subdivide their property into three lots. The Commission considered the proposal, and advised the Smiths to proceed to final subdivision plan subject to fourteen conditions being resolved prior to final submission. (Return of Record #4 page S). In September of 1988 the Smiths submitted their final subdivision plan to the Commission (Return of Record #4, page P) which the COmmission resolved to deny after considering it at a meeting held in November of 1988.

Pursuant to section 103(a) of the Greenwich Charter (Return of Record

#8(b)(6), the plaintiffs appealed the Commission's decision to the Greenwich Planning and Zoning Board of Appeals (hereinafter "Board"). (Return of record #1). Public hearings on the subdivision plan were held on April 19 and May 3, 1989, at which the Board reviewed the proposal de novo, pursuant to Sec. 103(a) of the Greenwich Charter. (Return of Record #s 6,7,8-0,9,10,11,12). Notice of these hearings was published in the Greenwich Time on April 7,12, and 28, 1989. (Return of Record #s 6 and 11). On May 15, 1989 the Board denied the Smiths' proposal (Return of Record # 14); notice of the decision was mailed to them on May 16 (Return of Record # 15) and was published in the Greenwich Time on May 17, (Return of Record #16).

Pursuant to Section 104 of the Greenwich Charter and Section 8-28 of the Connecticut General Statutes, the Smiths' brought this appeal to superior court. The appeal was commenced on May 31, 1989 by service on the defendant Board through iits authorized officers (see Sheriff's Return of Service) and the complaint was filed with the court on June 6, 1989. The Historical Society of the Town of Greewich and Anita deLesseps Keefe were made parties-defendat to this appeal in September, 1989, and the complaint was amended subsequent therto. All defendants have answered the complaint, and all parties have filed memoranda of law. The record was returned to court on August 31, 1989 except for several large exhibits, which were returned on October 24, 1990, the date the appeal was heard by the court. The Court finds the appeal is timely, and there are no procedural

grounds for sustaining or dismissing this appeal.

This appeal involves a proposed subdivision in the Mill Pond Historic District in the Town of Greenwich. The historic district was established in 1975 pursuant to Conn. Gen Stat. Sec. 7-147 et. seq. (Return of Record #8p). A study committee appointed by the Representative Town Meeting conducted an extensive study of the Strickland Road area of Cos Cob, including meetings with owners of real property expected to be included in the District, and an on-site inspection by a staff member of the Connecticut Historical Commission (Return of Record # 8p). The study committee recommended creating an historic district in the Strickland Road area, and the committee's report was approved by both the Connecticut Historical Commission and the Town Planning and Zoning Commission. (Return of Record #8p). The committee held a public hearing on the proposed district, at which all but one of the owners of real property in the district were represented. Among the reasons given by the committee for recommending creation of the district were its considerable cultural and historic significance; the fact that the area "constitutes a group of houses, in a compatible setting, which, taken as whole, visually expresses modes of living representative of the early American and Victorian periods". and the facts that the houses in the area had retained a high degree of integrity and no visual or other intrusions compromised the area's character. (Return of Record #8p).

The Representative Town Meeting

adopted the ordinance creating the historic district in December of 1975. (Return of Record # 13(u)(3)). The original district consisted of Fourteen properties, including that now owned by the plaintiffs ((Return of Record #8q). Seventy-six percent of the affected property owners approved creation of the district. (Return of Record #13dd). In 1978 the district was enlarged, after a vote by the residents, to include the eleven properties in Mill Pond Court (Return of Record # 13u). The plaintiffs at that time owned property at One Mill Pond Court. (Return of Record #13u).

In 1984 plaintiffs purchased the subject property (Return of Record #8(b)7), and, based on their previous ownership of property within the historic district, it can be inferred that they knew the subject property was within the district. In addition, the deed to plaintiffs' property contains the following language:

> Said premises are conveyed subject to...[r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich....

(Return of Record #8(b)7). Plaintiffs' property is situated in the heart of the historic district (Return of Record #8q) and consists of a 33,032 square foot parcel of land which contains one residential dwelling and a two story detached barn. (Return of Record #4). The portion of Strickland Road in which the subject property is situated is characterized by sweeping front lawns. (Return of Record #s 8(e) & (y).

The subdivision plan denied by the

Board proposes dividing the property into three lots, each in excess of 7500 square feet (Return of Record # 4p-10) with over 4800 square feet reserved for parks and recreation purposes. (Return of Record #4 P-1). The proposed lot one is currently open space comprising plaintiffs' front lawn. (Return of Record # 2). Plaintiffs' plan contemplates converting the barn into a dwelling on lot three, and constructing a new dwelling on lot one. The current dwelling would remain on lot two. (Return of Record # 4 p-1).

Subdivision approval in Greenwich generally involves a two-step procedure in which an applicant submits a preliminary plan to the Commission, which generally recommends that the applicant proceed to final plan. (Return of Record # 12, pages 88-90). In this case, the Commission studied the Smith's preliminary subdivision plan and advised the Smiths to proceed to final plan subject to the resolution of fourteen points prior to final submission. (Return of Record # 4-s). Among these points were the requirements that plaintiffs meet with Historic District Commission to determine an appropriate house location for Lot 1, and apply for a variance relative to the driveway. (Return of Record #4-s). Although plaintiffs met with the HDC it was unable to take a position on house location. (Return of Record # 4-R). Plaintiffs' application for a variance for the driveway was denied by the Planning the Zoning Board of Appeals. (Return of Record # 4-h).

Plaintiffs' proposal was opposed before both the Commission and the Board. (Return of Record #s 4-E, 4-D,

13--U, 13-V, 13-W, 13-Z, 13-aa, 13-bb, 13-bbb' #12 at pp 25-47, 50-53, 53-57, 57-69, 76-81,82). This opposition was based on the belief that the proposed subdivision was inconsistent with, and would adversely affect, the Historic District. (Id.) Tweny-three owners of property in the district, as well as the Historical Society, opposed the application. (Return of Record #s 13v and 13aa). The Historic District Commission provided the bulk of the evidence in opposition, and recommended against approval.

The plaintiffs' property is also located in the Coastal Zone as defined by the Connecticut Coastal Area Management Act. See Conn. Gen. Stat. $22a-94. Due to this fact, the subdivision was subject to review under state and local regulations as a coastal subdivision plan. See Sec. 6-266 of the Greenwich Municipal Code. At the hearing before the Board, the Commission presented testimony that the plaintiffs 'plan would negatively impact the natural vistas or viewpoints (Return of Record # 7 at pp 73-77). The plaintiffs submitted photographs and a diagram showing sight lines from their side of Strickland Road to Mill Pond. (Return of Record #8J). These photographs show that between Mill Pond and plaintiffs' side of Strickland Road lie the road itself and a row of houses. (Return of Record # 8J). The Commission's decision denying the subdivision plan did not contain any reasons based on the location of the property in the coastal zone.
(Return of Record # 4).

The board's decision to deny

subdivision approval stated the following reasons:

1. The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Developoment in that it does not meet the basic objectives of preservation of historic and architectural resources. Further-more, it does not preserve the natural features of the landscape; namely, the historic streetscape.

2. Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic District Commission which among other things, oversees erection and alteration of buildings in said district. Such plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

3. The applicants were aware of the property's location in the Historic District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

4. The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas.

In conducting a de novo review of plaintiffs' proposal the Board acted pursuant to section 103(a) of the Greenwich Charter which provides:

(a) The action of the Commission in approving or disapproving any subdivision may be reviewed by the Planning and Zoning Board of Appeals on petition by any Town agency. The Board of Education or the Housing Authority, by any person owning property in the Town, or by the person seeking approval of such subdivision, provided written notice of such petition is filed by the petitioner with the Commission and the Town CLerk within twenty days from the effective date of such action. Upon receipt of such written notice, the Commission shall transmit a record of the proceedings had before it to the Planning and Zoning Board of Appeals which after a public hearing had de novo shall have the power to uphold or reverse such action...

(c) The action of the Planning and Zoning Board of Appeals on a petition for review of a decision by the Planning and Zoning Commission shall constitute the action of the final planning authority of the Town with respect to

subdivisions.

Because such review was de novo, the Board acted as a planning commission whose review of subdivisions is authorized by Conn. Gen. Stat. Sec. 8-25 and Sec. 8-26.

The plaintiffs have brought this appeal of the Board's decision under Conn. Gen. Stat. Sec 8-28, which provides that "any person aggrieved by an official action or decision of a planning commission...may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court..." An appeal from the decision of an administrative agency may only be taken advantage of by strict compliance with the statute creating the right to appeal. Simko v. Zoning Board of Appeals, 206 Conn. 374, 377 (1988). Because the statutory provisions are mandatory and jurisdictional, failure to comply subjects the appeal to dismissal. Id. Aggrievement is a pre-requisite to maintaining an appeal. Smith v. Planning and Zoning Board, 203 Conn. 317, 321,371 (1987).

At the hearing before the court on October 24, 1990 Mr. Smith testified that he and his wife are the owners of the subject property. Record Item 7 is a copy of the deed conveying the property at 35 Strickland Road to the Smiths from Richard Cromwell, III, and Record Item 8 is a copy of the deed conveying an appurtenant strip of land to the Smiths from Duira B. Ward. It is found that based on the evidence in the record and the testimony of Mr. Smith, the plaintiffs are aggrieved and

entitled to maintain this appeal.

In reviewing the Board's decision, the court is not at liberty to substitute its judgment for that of the Board. Frito-Lay, Inc, v P & Z 206 Conn. 554, 572-3 (1988). The Court is only to determine whether the agency has acted illegally, arbitrarily, or in abuse of its discretion, Id. at 573 and whether the record reasonably supports the conclusions reached by the agency. Burnham v. PZC, 189 Conn., 261, 265 (1988); Stankiewicz v. ZBA, 15 Conn. App. 729 (1988), aff'd., 211 Conn. 78 (1989).

The Board acted in its administrative capacity when it reviewed plaintiffs' subdivision plan. See Reed v PZC, 208 Conn. 431, 433 (1988). In such capacity the Board had no discretion to deny the plan if it conformed to the subdivision regulations. Id. If the plan did not conform to the regulations, it could be disapproved. Id. On the appeal the plaintiffs have the burden of proving that the Board's dicision was erroneous. Burham v PZC 189 Conn. 261, 266 (1983).

The plaintiffs raise several claims of error by the Board. First, they claim that their subdivision proposal conformed to the regulations, therefore the board could not deny it. The plaintiffs argue that the Greenwich Municipal Code and subdivision regulations do not set forth precise, adequate or sufficient regulations to govern subdivisions in an historic district, such that an applicant is on notice that review of the plan will include a determination of its impact on the historic district. The Board rejected this claim, finding that

plaintiffs' proposal did not meet the basic objective of the Town Plan of Development to preserve historic resources. Because one of the purposes of the subdivision regulations is the development of the Town in accordance with the Town Plan of Development, the Board contends that protection of the historic district obviously will be concern when a subdivision plan in the district is being reviewed. The Board also rejected plaintiffs' claim that the regulations are imprecise, stating "the subdivision regulation referring to the plan of development [Section 6-260] should be sufficient to alert any reasonable person to examine the plan in this regard."

Plaintiffs next claim that the denial of their plan constitutes a taking of property without due process of law. The Board rejected this claim, concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. The defendant Board argues that plaintiffs have failed to establish a diminution in the value of their property as a result of the decision, and further, only one proposal has been rejected, not all proposals.

Next, plaintiffs claim that the Board's conclusion that the subdivision would impair coastal views in erroneous, and that construction on other properties in the coastal zone has been allowed. They also contend that their proposal to construct a conforming single-family residential structure is exempt from coastal site plan review under section 6-111(c)A of the Greenwich Municipal Code, which allows exemptions

for such construction beyond one hundred feet of the mean high tide line. This claim was also rejected, the Board finding that the subdivision would alter the natural features of vistas, thereby impairing that coastal resource.

The Board argues that because of this finding, reasonable mitigation measures were required, which in this case include seeking alternatives to the proposed subdivision. The Board also argues that while an exemption from coastal review is permitted, in this case it would not be responsible to grant one to a plan not consistent with a policy of the Coastal Area Management Act.

Plaintiffs claim that the Board's decision was erroneous because their proposal would neither impair the historic character and appearance of the historic district nor violate the integrity of the district. They argue that neither state nor local law prohibits construction in historic district, nor gives the Historic District Commission the power to prevent subdivision or new construction. Plaintiffs contend the "(a) Planning and Zoning Commission may not deny an application on the grounds that such application was unacceptable to the (Historict District Commission)." The Board found that the subdivision would not preserve the historic streetscape, and therefore would impair the appearance and historic character of the historic district. The Board also stated that "(t)he residents who voted fo form an Historic District were given assurance of preservation of their historic neighborhood even though they knew certain freedoms of future

development would be regulated and restricted." The Board argues that construction of a new house on plaintiffs' front lawn would be a "severe blow" to the district, and "(i)f permitted, not only would it discourage preservation, but would be an open invitation to speculators seeking development. The public welfare and future generations deserve better."

Finally, plaintiffs raise the issues of reliance and estoppel. Their position is that the grant of preliminary approval by the Commission estops the Board from denying approval. They contend that prior to submitting their proposal to the Commission, they met with staff members to ascertain that their subdivision would be legal. They purchased additional property and altered their plan. When the plan was submitted, preliminary approval was granted subject to fourteen conditions. Plaintiffs claim that they were led to believe that if they met the fourteen conditions as well as the regulations, the final plan would be approved. They further argue that town officials were aware that a house was planned for Lot One when preliminary approval was granted, and that their reliance on the preliminary approval was justified.

The defendant argues the following points: First, plaintiff applied for and received "preliminary layout" approval under Section 6-265 of the subdivision regulations, which describes the same as "a helpful guide in the preparation of a subdivision plan." Second, the public hearings which were held on the application were not useless gestures or mere formalities, but were held to "afford interested parties an

opportunity to be heard to give the Commission or Board..... guidance." Further, "if in advance of the public hearing, the members felt bound by the preliminary layout regardless of what might be produced at the public hearing, it would be predisposition and the decision rendered would be invalid." Third, estoppel is a shield, not a sword, thus it is improperly invoked by plaintiff. Fourth, municipal estoppel can only result when it has been induced by an agent having authority. Here, the claim of estoppel could only lie, if at all against the Commission, not against the defendant Board, which heard the matter de novo. Further, plaintiffs chose to file their application; they were not induced to do so. Fifth, plaintiffs waived any claim of estoppel against the Commission by petitioning the Board for review. Sixth, preliminary approval does not mean approval. It means if the conditions are met, the plan may be approved. In this case, plaintiffs did not meet all the conditions.

"The first reason given by the Board for denying the Smiths' plan is that: The proposed subdivision did not meet the purposes of the subdivision regulations...It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely the historic streetscape." (Return of Record #15). The Smiths argue against this reason on the grounds that the proposal met the requirements of the subdivision regulations as written and

the the Town Plan of Development is not a regulation.

Section 6-260 of the Greenwich Municipal Code provides that one of the purposes of the subdivision regulations is to "further the orderly devlopment of the Town in accordance with the Town Plan of Development (Return of Record #8n). The Town Plan of Development has as one of its "Basic Objectives" the preservation of historic resources. (Return of Record #tt). The Town Plan of Development also provides that "Greenwich has a rich...historical heritage that should be protected for the benefit and enlightenment of future generations." (Return of Record #tt,p.5) and that "conserving the Town's ... historical resources is a notably effective land use tool for preserving the essential character and spirit of the community." (Id.at p.16). Other reference to the importance of historic factors appear in the Town Plan of Development. (See, eg, p.26, Return of Record #8n). An evaluation of historical factors is specifically mentioned in the Greenwich Subdivision Regulations, Sec6-266(a) 19, governing subdivisions in the coastal zone.

It is the opinion of the court that the plaintiffs' position is without merit. Not only do the subdivision regulations mention historic factors, but they state as a purpose the development of the town in accordance with the Town Plan of Development, which has preservation of historic resources as a basic objective. Further, given the established public policy favoring historic preservation, see Conn. Gen. Stat. $7-147a et seq AND Greenwich Municipal code $6-307, and the

plaintiffs' deed restriction, it is found that the Board did apply standards contained in the regulations to the subdivision, and plaintiffs had notice that historic factors would be considered.

The Board's finding that the proposal would impair the historic streetscape is supported by the record. The Smiths' side of Strictkland Road is characterized by homes on lots with sweeping front lawns. (Return of Record #8e and 13y). THe plaintiffs plan to convert their front lawn into a building lot and construct theron a house with a thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front property line, twenty feet from the south property line, and fifteen feet from a line of trees. (Return of Record #8e). These exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the Board's conclusion in that regard.

The Board also cited the opposition of the Historic District Commission, which, among other things, oversees erection and alteration of buildings in the historic district. (Return of Record # 15).

Although research has revealed no Connecticut cases addressing the precise issue in this case, Victorian Realty Group v. City of Nashua, 534 A.2d 381 (1987) is on point. The issue in Victorian Realty Group was whether a planning board has the authority to reject a subdivision or resubdivision proposal for property in a historic district for reasons relating the historic character and significance of the property. 534 A.2d at 383. The

plaintiff owned two contiguous lots, one containing a main building and a carriage barn, and the other a single family home. He had purchased the second lot in order to integrate it and the carriage house on the first lot into a single lot, which could be developed as a multi-unit apartment dwelling. Id. at 382. He applied for a lot line relocation, but after public hearings and input from the historic district commission, the planning board denied his application for the reason that the historic character and significance of the property required that the main house and carriage house stay together on one lot. Id. The Historic District Commission had recommended against the proposal, expressing concern about any visual separation of the two buildings, and that the conversion would necessitate additional parking which would detract from the residential character of the neighborhood. Id.

The city's regulations authorized the planning board to consider the proposal's effect on health, safety, nuisance, property values, aesthetics, traffic conditions and future highway improvement. Id. at 383. Historic preservation was part of the city's overall plan to promote general community welfare. Id.

Upholding the Board's denial, the court stated: "It would frustrate clearly expressed legislative intent if we were to hold that historic district commissions could not render, and planning boards could not consider, recommendations concerning applications for the subdivision and site plan approval involving an historic district."

Id. at 383. Noting that the historic district commission members are most familiar with the historic district, and "uniquely suited to provide recommendations to the planning board, " the court concluded that the board "may properly consider the historic district commission and may deny the plaintiffs' subdivision application based on factors related to the historic character and significance of the buildings at issue." Id. emphasis added.

In A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E. 2d 444 (1979) the court stated:

> It is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district..." just as important is the preservation and protection of the setting or scene in which [structures of architectural] and historical sigtnificance] are situated."

A-S-P Associates, 258 S.E. 2nd at 451, quoting Maher v. City of New Orleans, 371 F. Supp. 653, 663 (E.D. La. 1974) (emphasis added)

It is the opinion of this court that it should follow these cases, and hence the Board's consideration of, and decision based on, historic considerations was proper. The evidence on the record supports the Board's finding that the proposed subdivision could impair the appearance of the

historic streetscape. Therefore, it is found that the decision of the Board on this ground is not illegal or clearly erroneous.

As another reason for its decision, the Board stated:

> The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas. (Return of Record #15).

The decision of the Commission did not contain any reasons for denial related to the location of the property within the coastal zone (Return of Record #4), and the record of proceedings before the commission does not contain any evidence related to the coastal zone. The board, in its review of the subdivision plan, received the following evidence relative to the coastal zone: Exhibit 8j, photographs of coastal views impacted by the subdivision with a map showing sight lines from three neighboring propertie; and testimony of Jim Sandy of the PLanning and Zoning Commission. Mr. Sandy stated at pages 75-76 that coastal factors and policies of coastal area management must be considered in a decision on a subdivision in the coastal zone, and this includes consideration of historic factors and the significant alteration of natural vistas or viewpoints. Mr. Sandy stated: "...[I]f you place the house down on the street and if you go to the [neighbor's] house

or even to the bungalow and try to get the same view of the water, you are not going to be able to do it."

Section 6-111 of the Greenwich Municipal Code established a coastal zone Overlay on the Town in accordance with Conn. Gen Stat. $22a-90 to 96, the Connecticut Coastal Management Act. Under Subsection (c)A(4) an exemption from coastal site plan review may be given for construction of a conforming single-family residential structure beyond 100 feet of the mean high tide line. At the hearing on this appeal, Mr Smith stated that coastal site plan review was conducted by the Commission on both the preliminary and final subdivision proposal. Section 6-111(c)B provides that "[a]n activity determined to be potentially inconsistent with any of [the standards in Sec. 6-111(c)D] shall have a formal review by the Commission." Among these standards are whether the proposed activity: (1) Is in accordance with the plan of development, (2) Preserves important open space and other features of the natural environment, (3) Does not materially obstruct significant waterfront views, and (4) Is consistent with all of the above purposes as authorized by the State Coastal Management Act. Greenwich Municipal Code $6-111(c)D. Among these purposes is to preserve and enhance coastal resources. Greenwich Municipal Code $6-111(a)A(2). The Board found this purpose was defeated by the Smith's plan, which it found would alter the natural features of vistas.

In support of their position the Board also cites Conn. Gen. Stat. $22a-92(b)(1)(J) which provides "Policies

concerning development, facilities and uses within the coastal boundary are to require reasonable mitigation measures where development would adversely impact historical, archeological or paleontological resources that have been designated by the state historic preservation officer." The Board contends that because alternatives to the proposed subdivision were available which would mitigate the impact on the views, these alternatives must be required.

"The Coastal Management Act delegates the administration of the state-wide policy of planned coastal development to local agencies charged with responsibility for zoning and planning decisions. See General Statutes $$22a-105, 22a-106. the act envisages a single review process, during which proposals for development within the coastal boundary will simultaneously be reviewed for compliance with local zoning requirements and for consistency with the policies of planned coastal development." General Statutes $22a-109.

Vartuli v. Sotire, 192 Conn. 353,358 (1984). Section 6-266(a)(20) provides that "(f)or subdivisions within the coastal zone boundaries, the standards contained in the Coastal Area Management Act of the State of Connecticut shall be applied" in addition to the other standards applicable to subdivisions. Conn.Gen. Stat. $22a-106, the criteria and process for coastal site plans, provides in subsection (a) that a municipal board "shall determine whether or not the potential adverse impacts of the

proposed activity on both coastal resources and future water-dependent development activities are acceptable."

It is found that the only physical evidence presented to the Board relative to its conclusion that natural vistas would be altered by the subdivision is Exhibit Bj, showing the site lines to Mill Pond from homes on Strickland Road. This evidence does not support the Board's conclusion and the the standard set forth in regulation 6-111(D)(3), that "significant" views would be "materially" obstructed by the subdivision, has not been met. It is found that the photographs and map indicate that the planned house on lot One would have minimal impact of existing view of the pond. THerefore, it is the opinion of the court that the record does not reasonably support this conclusion reached by the Board, and this reason is insufficient to support the decision to deny the subdivision. Defendant seems to believe that any development which changes a view necessarily has an adverse impact on that view, and such a position is contrary to the policy of the CAMA of promoting both the natural environment and economic growth. See Conn. Gen. Stat. $22a-92.

Because the Board's action is to upheld if any one of the stated reasons is sufficient to support the decision, see Primerica v. PZC, 211 Conn. 85,96 (1989), it is found that the appeal be dismissed because the reasons relating to historic factors are sufficient to support the decision.

Judgment may enter accordingly.

John J.P. Ryan, J.

89 A

Town of Greenwich
May 15, 1989

Harry E. Peden Jr., Esq.
Whitman and Ransom
100 Field Point Rd.
Greenwich, Conn. 06830

Dear Sir:

This will notify you that effective May 15, 1989 the Planning and Zoning Board of Appeals of the Town of Greenwich (Present: Paul Lynch, Chairman, Barbara Hopkins, Secretary, William Rader, Louisa Stone and Edward Manuel) rendered the following decision.

Appeal No. 7400 (Continuation) heard pursuant to due notice on May 3, 1989.

Appeal of E. Don Smith and Eileen Smith for review of the Planning and Zoning Commission decision dated November 22, 1988 and effective December 8, 1988 denying subdivision Application #1066 of E.Don Smith and Eileen Smith, to subdivide land on the westerly side of Strickland Road (35) Cos Cob, in the R-7 zone.

It was resolved that said appeal be denied on the following grounds:

Pursuant to statute the Board is authorized to review on appeal decisions of the Planning and Zoning Commission on matters involving subdivision. The statute provides in such instances for the hearing of the Board to be "de novo" Further in the instant appeal, the property in question is located in an Historic District, thus bringing into

play Article 5 of the Greenwich Municipal Code. Accordingly, the Board heard extensive testimony, and evidence was presented, regarding such code provisions. After careful considerations of this and other testimony and evidence presented, the Board reached its decision that this appeal should be denied.

The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Developoment in that it does not meet the basic objectives of preservation of historic and architectural resources. Further-more, it does not preserve the natural features of the landscape; namely, the historic streetscape.

Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic Districxt Commission which among other things, oversees erection and alteration of buildings in said district. Such plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

The applicants were aware of the property's location in the Historic

District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas.

A related although not binding case is Victoria Realty Group v. City of Nahua (No.86-439, decided November 5, 1987), in which the Supreme Court of New Hampdshire ruled that a planning board in New Hampshire may reject a proposed resubdivision when a preservation commission recommends against the proposal. Here the owner of a lot containing both a three-story Victorian house and a detached carriage house sought unsuccessfully to convert the carriage house for either office use or dwelling units. The owner then purchased an adjoining property in hope that he could relocate the lot line between his two properties so that the carriage house would become part of the second expanded lot and he could then convert the carriage house to new uses. The Planning Board denied the lot line relocation stating that the historical character and significance of the property requires that the main house and carriage house remain on one lot. The Supreme Court upheld the board's

decision as indicated above.

Because of the foregoing, the applicants' request for subdivision of property into three lots is hereby denied.

Mr. Lynch, Mrs. Hopkins, Mrs. Stone, and Mr. Rader voted to deny the appeal.

Mr. Manuel abstained.

The date of these minutes and rendition date of said decision is May, 15, 1987.

Barbara H. Hopkins
Secretary

Town of Greenwich

December 8, 1988

Mr. E.Don Smith
35 Strickland Road
Cos Cob, Ct. 06807

Re: Subdivision Application # 1066 of
E.Don Smith and Eileen Smith
Subdivision Plan prepared by J.A. Kirby
Dated March 17, 1988,
Revised September 1988.

Dear Mr. Smith:

The Planning and Zoning Commission held a meeting on November 22, 1988 at which the Commission considered the above referenced application and took the following action:

The commission adopted the following final resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS, the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic districk; and

"WHEREAS,a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development'"; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property whcih would provide for the same or greater number of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFOREE, BE IT RESOLVED that final Subdivision #1966 of E. Don dSmith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J.A. Kirby Company dated March 17, 1988 revised September 26, 1988 is hereby denied."

Sincerely,

John Gessner
Senior Planner

TOWN OF GREENWICH

Mr. E.Don Smith
35 Strickland Road
Cos Cob, Ct. 06807

Location:
Strickland Rd.

Town Project No. 87-4A

Re: Subdivision Application # 1017-C
Smith

At the Planning and Zoning Commision's meeting held on April 21, 1987 after studying your preliminary subdivision plan, it was decided to notify you of the following results:

The Planning and Zoning Commission advised the applicant to proceed to a final subdivision plan subject to the following being resolved prior to final application submission:

1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that the portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

2. The commission observed that the area reserved for park and playground being 14.67%, conventionally required to be 15%, is acceptable as it is calculated from a gross area which includes a **free-throw** lot for which park and playground is not required.

3. The utility easement shall be located so as to minimize impacts to significant trees.

4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

7. That provisions for access easements be indicated on the record sheet.

8, That the existing southerly curbcut be the sole access way to Lot 1.

9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc. be submitted for review and approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distrance, if significant trees or the stone wall are adversely effected.

11. The applicant must obtain a sewer

permit prior to the issuance of a Building Permit.

12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

13. The following note is to appear on the construction sheet: "Prior to any excavation(s) the applicants(s), in accordance with Public Aact 77-350, shall be required to contact Call Before You Dig, Inc. at 1-800-922-4455 for markout of underground utilities."

14. Submit a driveway plan in accordance with Sec. 6-131. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC and D.P.W. prior to submitting final plan.

Additional details, if any,will be available in the Minutes of this meeting.

Sincerely,

Eric Brower
Director of Planning
and Zoning